Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 13 September 2012[1]

Case C-547/10 P

Swiss Confederation
v
European Commission

(Appeal — Actions for annulment — Swiss Confederation — Admissibility — Locus standi — Examination of the Court's own motion — EC-Switzerland Agreement on Air Transport — Objectives of the agreement — Exchange of traffic rights — Regulation (EEC) No 2408/92 — Access of Community air carriers to intra-Community air routes — Articles 8 and 9 — Scope — Commission's powers of review — Exercise of traffic rights — Decision 2004/12/EC — German measures relating to the approaches to Zurich Airport — Principles inherent in the freedom to provide services — Principle of non-discrimination — Proportionality)

I – Introduction

1. The appeal brought by the Swiss Confederation seeks to have set aside the judgment of the General Court of the European Union of 9 September 2010[2] ('the judgment under appeal'). The General Court dismissed the action brought by the Swiss Confederation for the annulment of Decision 2004/12/EC[3] on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on Air Transport[4] ('the Air Transport Agreement') and Regulation (EEC) No 2408/92[5]. By that decision, the Commission found that the Federal Republic of Germany could continue to apply the national measures which were the subject of the decision at issue, which aimed to establish procedures for landings and take-offs at Zurich Airport (Switzerland).

1 — Original language: French.

2 — Case T-319/05 [2010] ECR II-4265.

3 — Commission Decision of 5 December 2003 on a procedure relating to the application of Article 18(2), first sentence, of the Agreement between the European Community and the Swiss Confederation on air transport and Council Regulation (EEC) No 2408/92 (OJ 2004 L 4, p. 13, 'the contested decision').

4 — The Agreement was signed on 21 June 1999 in Luxembourg and approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1). The seven agreements concern the free movement of persons, air transport, the carriage of goods and passengers by rail and road, trade in agricultural products, mutual recognition in relation to conformity assessment, certain aspects of government procurement, and scientific and technological cooperation.

5 — Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8, 'the Access Regulation').

2. The present case is unprecedented in more than one respect. First, it is the first action for annulment brought by the Swiss Confederation before the judicature of the European Union. The case therefore provides the Court with an opportunity to give a ruling on the question of whether non-member States having a particular legal relationship with the European Union may bring actions for annulment before the European Union judicature and, if so, on what conditions. That is a question which has not yet received a reply in the present case because neither the Court of Justice[6] nor the General Court has expressed an opinion on the procedural status of the Swiss Confederation.

3. Secondly, the case enables the Court to interpret the provisions of the Air Transport Agreement and those of the Access Regulation, as well as to express a view on the connections between those two instruments. The questions raised by the Swiss Confederation's appeal concern, in essence, the scope of Articles 8 and 9 of the Access Regulation and of the Commission's powers of review under that regulation. Consequently the present case also invites the Court to interpret the substantive rules laid down by those provisions in relation to the principle of the freedom to provide services, the principle of non-discrimination and the principle of proportionality in the particular context of the Air Transport Agreement.

II – Legal context

A – *The Air Transport Agreement*

4. Article 1 of the Air Transport Agreement is worded as follows:

'1. This Agreement sets out rules for the Contracting Parties in the field of civil aviation. These provisions are without prejudice to those contained in the EC Treaty … as well as under all relevant Community legislation listed in the Annex to this Agreement.

2. For this purpose, the provisions laid down in this Agreement as well as in the regulations and directives specified in the Annex shall apply under the conditions set out hereafter. Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission … given prior to the date of signature of this Agreement. The rulings and decisions given after the date of signature of this Agreement shall be communicated to [the Swiss Confederation]. At the request of one of the Contracting Parties, the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.'

5. Article 2 of the Agreement states that the provisions of the Agreement and its Annex are to apply to the extent that they concern air transport or matters directly related to air transport as mentioned in the Annex to the Agreement.

6. Under Article 3 of the Agreement, within the scope of the Agreement any discrimination on grounds of nationality is prohibited.

7. Article 15(1) of the Agreement provides, subject to the Access Regulation, that traffic rights are granted to Community and Swiss air carriers between any point in Switzerland and any point in the Community.

6 — Order of 14 July 2005 in Case C-70/04 *Switzerland* v *Commission* transferring the case to the General Court.

8. Article 18(2) of the Agreement provides:

'In cases which may affect air services to be authorised under Chapter 3, the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex. …'

9. Under Article 19(2) of the Agreement, whenever the Community institutions act under the powers granted to them by the Agreement on matters which are of interest to the Swiss Confederation and which concern the Swiss authorities or Swiss undertakings, the Swiss authorities are to be fully informed and given the opportunity to comment before a final decision is taken.

10. Under Article 20 of the Agreement, all questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under the Agreement are of the exclusive competence of the Court of Justice.

11. According to the provisions of the Annex to the Agreement, wherever acts specified in the Annex contain references to Member States of the European Community, or a requirement for a link with the latter, the references shall, for the purpose of the Agreement, be understood to apply equally to the Swiss Confederation or to the requirement of a link with the Swiss Confederation. The Annex refers, inter alia, to the Access Regulation.

B – *The Access Regulation*

12. Article 2(f) of the Access Regulation defines 'traffic right', for the purposes of that regulation, as 'the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports'.

13. Article 3(1) of the Access Regulation provides as follows:

'Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.'

14. In accordance with Article 8 of the Access Regulation:

'…

2. The exercise of traffic rights shall be subject to published Community, national, regional or local operational rules relating to safety, the protection of the environment and the allocation of slots.

3. At the request of a Member State or on its own initiative the Commission shall examine the application of paragraphs 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure. The Commission shall communicate its decision to the Council and to the Member States.

…'

15. Article 9 of the Access Regulation provides as follows:

'1. When serious congestion and/or environmental problems exist the Member State responsible may, subject to this Article, impose conditions on, limit or refuse the exercise of traffic rights, in particular when other modes of transport can provide satisfactory levels of service.

2. Action taken by a Member State in accordance with paragraph 1 shall:

— be non-discriminatory on grounds of nationality or identity of air carriers,

…

— not be more restrictive than necessary in order to relieve the problems.

3. When a Member State considers that action under paragraph 1 is necessary it shall, at least three months before the entry into force of the action, inform the other Member States and the Commission, providing adequate justification for the action. …

4. At the request of a Member State or on its own initiative the Commission shall examine action referred to in paragraph 1. …'

III – Background to the dispute

16. Zurich Airport is situated at Kloten, north-east of the city of Zurich and about 15 kilometres south-east of the border between Switzerland and Germany. Given the proximity to the German border, all flights landing in Zurich from the north or north-west must use German airspace while landing.

17. Originally, the use of German airspace for approaching and leaving Zurich Airport was governed by a bilateral agreement between the Swiss Confederation and the 'Federal Republic of Germany of 17 September 1984. However, that agreement was denounced by the Federal Republic of Germany on 22 March 2000, with effect from 31 May 2001, following problems with its implementation. The two countries subsequently signed a new agreement on 18 October 2001, which has not been ratified.

18. On 15 January 2003 the German federal aviation authorities published the 213th Regulation for the implementation of German air traffic regulations establishing procedures for instrument-guided landings and take-offs at Zurich Airport ('the Implementing Regulation'). The Implementing Regulation set out a number of limitations governing the approach to Zurich Airport as of 18 January 2003. On 4 April 2003 the German federal authorities published the first regulation amending the Implementing Regulation; that amendment came into force on 17 April 2003.

19. The measures taken by the Federal Republic of Germany were designed essentially to prevent, under normal weather conditions, overflight at low altitude over the German territory close to the Swiss border between 21.00 and 07.00 on weekdays and between 20.00 and 09.00 on weekends and public holidays, with a view to reducing the noise to which the local population was exposed. As a result, the two landing approaches from the north previously used as the main approaches by flights landing at Zurich Airport were no longer possible during these periods.

20. In addition, the Implementing Regulation contained two other measures designed to reduce noise pollution in the vicinity of the border between Germany and Switzerland. First, concerning the eastern approach to the airport, it laid down certain minimum altitudes to be maintained during the aforementioned periods. Secondly, it provided that take-offs towards the north had to be made in such a way as to maintain, from the time of entry into German airspace, minimum flight altitudes which varied according to the time of take-off. Thus, if the aircraft took off during the aforementioned periods, it would first have to make a detour before reaching the German border, so as not to enter German airspace until it had reached the minimum altitude prescribed by the Implementing Regulation.

21. On 10 June 2003 the Swiss Confederation submitted to the Commission a request that it take a decision to the effect that the Federal Republic of Germany could not continue to apply the Implementing Regulation, as amended by the first amending regulation of 4 April 2003, and that the Federal Republic of Germany was required to suspend the application of that regulation until the Commission had adopted a decision.

22. Following correspondence with the Swiss and German authorities, on 14 October 2003 the Commission sent a statement of objections to those authorities, asking for their observations. Then, after an exchange of observations, the Commission transmitted, by letter of 27 October 2003, a draft decision on which the Swiss Confederation had an opportunity to submit its observations at the meeting of the Advisory Committee on 'market access (air transport)' on 4 November 2003.

23. On 5 December 2003 the Commission adopted the contested decision. Article 1 of the decision which provides that the Federal Republic of Germany may continue to apply the Implementing Regulation, as amended by the first amending regulation of 4 April 2003. In accordance with Article 2, the decision is addressed solely to the Federal Republic of Germany.

IV – Procedure before the General Court, the judgment under appeal and the procedure before the Court of Justice

24. By application lodged at the Registry of the Court of Justice on 13 February 2004, the Swiss Confederation brought an action for the annulment of the contested decision. By order of the President of the Court of 21 July 2004, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission in those proceedings.

25. By the abovementioned order in *Switzerland* v *Commission*, the Court of Justice referred the case to the General Court (Court of First Instance) after finding that the latter had jurisdiction to give a ruling in the action brought by the Swiss Confederation, whether the Swiss Confederation should be treated as a Member State within the meaning of the second paragraph of Article 230 EC or as a legal person as provided for in the fourth paragraph of that article.[7]

26. After the case was remitted to the General Court, that Court granted Landkreis Waldshut leave to intervene in support of the form of order sought by the Commission by order of 7 July 2006.[8]

27. In the judgment under appeal the General Court dismissed the action brought by the Swiss Confederation, but did not rule on its admissibility, stating, at paragraph 55 of the judgment, that, 'given the circumstances of the present case, it is not necessary to rule on the admissibility of the present action since it must in any event be dismissed as unfounded'.[9]

28. On the substance of the case, the General Court found that the Commission could not be criticised for:

— finding that the German measures in question did not fall within the scope of Article 9(1) of the Access Regulation;

7 — Paragraphs 20 to 22 of the order. However, the Court of Justice did not express an opinion as to the Swiss Confederation's status as an applicant, nor did it expressly rule out laying down any particular rules for the Swiss Confederation as an applicant in an action for annulment relating to a measure adopted by virtue of the Air Transport Agreement

8 — Order in Case T-319/05 *Switzerland* v *Commission* [2006] ECR II-2073.

9 — That approach is, according to the General Court, possible by virtue of the judgments it cited. These were in particular C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52, and Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26.

— failing to take into account the rights of the operator of Zurich Airport and those of persons living near the airport when examining those measures in the context of the Air Transport Agreement and under Article 8(3) of the Access Regulation, and

— deciding that those measures were consistent with the principles of equal treatment and proportionality.

29. By its appeal, lodged at the Registry of the Court on 23 November 2010, the Swiss Confederation asks the Court to set aside the judgment under appeal, annul the contested decision, and order the Commission to pay the costs. Alternatively, it asks that the case be referred to the General Court and that the decision on costs be reserved.

30. The Commission contends that the Court should dismiss the appeal and order the Swiss Confederation to pay the costs of these proceedings. The applications by Landkreis Waldshut and the German Government are in essence the same. However, Landkreis Waldshut also claims, in the alternative, that the Court should set aside the judgment under appeal and dismiss the Swiss Confederation's appeal as inadmissible.

31. The Swiss Confederation, Landkreis Waldshut, the German Government and the Commission were represented at the hearing on 26 April 2012.

V – Analysis

A – *The characteristics of the Air Transport Agreement*

32. First of all, it should be observed that the Court has had several occasions to interpret another bilateral agreement between the European Community and the Swiss Confederation, namely that on the free movement of persons.[10] The principles laid down by the case-law relating to the interpretation of that agreement are helpful in the present case also.

33. In that case-law, the Court observed that the EC-Switzerland agreements, including the Air Transport Agreement, had been signed after the rejection by the Swiss Confederation of the Agreement on the European Economic Area[11] and that, consequently, the Swiss Confederation had not subscribed to the project of an economically integrated entity with a single market, based on common rules between its members, but had chosen the route of bilateral arrangements with the European Union and its Member States in specific areas.[12]

34. For that reason, the Court concluded that the Swiss Confederation had not joined the internal market and that, consequently, the interpretation given to the provisions of European Union law concerning that market could not be automatically applied by analogy to the interpretation of the agreement, unless there were express provisions to that effect laid down by the agreement itself.[13]

10 — Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6). That agreement is part of the package of seven agreements mentioned in footnote 4 above.

11 — OJ 1994 L 1, p. 3.

12 — Case C-351/08 *Grimme* [2009] ECR I-10777, paragraph 27; Case C-541/08 *Fokus Invest* [2010] I-1025, paragraph 27; and point 41 et seq. of my Opinion in Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7229.

13 — See, to that effect, *Grimme*, paragraphs 27 and 29 and the case-law cited; *Fokus Invest*, paragraph 28; and *Hengartner and Gasser*, paragraphs 41 and 42.

35. With regard to the interpretation of the Air Transport Agreement, it should be stressed that this is an international treaty concluded by the European Community with a non-member country which must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives.[14]

36. As in the case of the agreement on the free movement of persons, not all the freedoms of the single market are covered by the Air Transport Agreement and there is no prospect of accession to the European Union. Therefore the agreement must be interpreted like a conventional international agreement, that is to say, on the basis of the wording and the objects of the agreement, as laid down by the Vienna Convention, although it must be noted that only the case-law prior to the signature of the Agreement is to be taken into account in the interpretation of the provisions of secondary law applicable in the context of that Agreement by virtue of Article 1(2) of the Agreement.

37. As there is no precedent for the present case, before I consider the pleas raised by the Swiss Confederation in support of its appeal, I shall discuss the admissibility of its action for annulment. In particular, the question is what is the Swiss Confederation's procedural status in the present case and, more precisely, whether it must be treated as a Member State or as a legal person within the meaning of the relevant provision of primary law applicable *ratione temporis*, namely the fourth paragraph of Article 230 EC.[15]

B – *Admissibility of the action for annulment brought by the Swiss Confederation*

1. Admissibility of the cross-appeal by Landkreis Waldshut

38. In the present case, Landkreis Waldshut raises the objection, in the alternative in its cross-appeal, that the Swiss Confederation's action for annulment is inadmissible on the ground of lack of interest in bringing proceedings. The admissibility of such a claim was disputed by the Swiss Confederation on the basis of Article 117(2) of the Court's Rules of Procedure.

39. It must observed that, just as for a principal appeal, for an appellant to have an interest in bringing proceedings the cross-appeal must be capable, if successful, of procuring an advantage to the party bringing it.[16] However, in the present case, Landkreis Waldshut was successful at first instance. Therefore the fact that the General Court omitted to consider the admissibility of the Swiss Confederation's application for annulment was of no consequence for the intervener's rights.

14 — Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331) provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. See inter alia Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 47.

15 — As the contested decision was made by the Commission before the Treaty of Lisbon entered into force, the conditions for the admissibility of the action in force at the date of the decision must be examined, that is to say, by reference to Article 230 EC. It must be observed that, as a result of the entry into force of the Treaty of Lisbon, the reference to the concept of 'decision' was removed from the fourth paragraph of Article 263 TFEU. It was replaced by a distinction between acts addressed to the applicants and other acts of direct and individual concern to them. In addition, for regulatory acts which do not require implementing measures, the new wording removed the requirement that the act should be of individual concern and merely stated that it should be of direct concern. See Case T-262/10 *Microban International and Microban (Europe)* v *Commission* [2011] ECR I-7697, paragraph 17 et seq.

16 — Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 33.

40. Furthermore, the Court has consistently held that an intervener has no standing to raise a plea of inadmissibility not set out in the form of order sought by the defendant.[17] As the Commission, the defendant at first instance, did not plead the inadmissibility of the action brought by the Swiss Confederation but, on the contrary, confined itself to seeking the dismissal of the appeal on its merits, I consider that Landkreis Waldshut had no standing to raise the objection of inadmissibility in question, which is why the Court is not required to consider the pleas put forward in that respect by Landkreis Waldshut.

2. The need for the Court to consider *locus standi* of its own motion

41. Article 230 EC was intended to regulate strictly the admissibility of applications for annulment.[18] *Locus standi*, like any other absolute bar to proceedings, is a procedural requirement which, if it is not satisfied, means that the Court has no jurisdiction to deal with the substance of the case.[19]

42. Under Article 92(2) of the Rules of Procedure, the Court may at any time of its own motion decide whether there exists any absolute bar to proceeding with a case. As the dispute concerning the applicant's *locus standi* is a plea which involves a question of public policy and alleges disregard of the conditions of admissibility laid down by Article 230 EC, the Court, when seised with an appeal on the basis of Article 56 of its Statute, may, and even must, give a ruling on that plea.[20]

43. In the present case, the General Court relied on what is known as the *Boehringer* case-law to justify its approach consisting in not giving a ruling on the question of the admissibility of the action for annulment, without however indicating in any way why that case-law should be applied to the present case.[21]

44. That approach, which evades consideration of the admissibility of actions for annulment, calls for the following observations.

45. The fact that, under Article 92(2) of the Rules of Procedure, the Court may at any time of its own motion decide whether there exists any absolute bar to proceeding with a case cannot, in my opinion, lead to the conclusion that the European Union judicature may arbitrarily refrain from deciding. That approach can be justified only by exceptional circumstances.[22]

17 — Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 67 and the case-law cited.

18 — Regarding the strict way in which the Court interprets the conditions which must be met by a legal person for the purpose of bringing an action for annulment, see Case C-50/00 P *Unión de Pequenos Agricultores* v *Council* [2002] ECR I-6677, paragraph 44.

19 — See, to that effect, point 31 of the Opinion of Advocate General Ruiz-Jarabo Colomer in *Council v Boehringer*

20 — Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 35 and the case-law cited; Case C-362/06 P *Sahlstedt and Others* v *Commission* [2009] ECR I-2903, paragraph 22 and the case-law cited, and order in Case C-517/08 P *Makhteshim-Agan Holding and Others* v *Commission* [2010] ECR I-45, paragraphs 53 and 54. See also Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 23 and the case-law cited.

21 — In *Council* v *Boehringer* the Court, ruling on an appeal against a judgment of the Court of First Instance concerning an action against a directive, stated that it was for the Court of First Instance to assess whether in the circumstances of the case *the proper administration of justice justified* the dismissal of the action on the merits in that case without ruling on the objection of inadmissibility raised by the Council; see in particular paragraph 52 of *Boehringer*. On the other hand, in the second case mentioned at paragraph 55 of the judgment under appeal, namely *France* v *Commission*, the Court merely took the view that, given the circumstances in that case, it was not necessary to rule on the objections as to admissibility raised by the Commission, since the form of order sought by the French Republic had in any event to be dismissed on the substance; see in particular paragraph 26 of *France* v *Commission*.

22 — See, for an example of such circumstances, the Opinion of Advocate General Poiares Maduro in Case C-273/04 P *Poland* v *Council* [2007] ECR I-8925, point 27 et seq. In that case, the Advocate General considered that the application was admissible on the basis of flexible interpretation of the plea of inadmissibility raised in relation to the period for bringing proceedings. That approach was based on the overriding requirements of the principle of effective judicial protection.

46. I would like to point out that, where a court dismisses an action on the merits even if a party raises a plea of inadmissibility, that reverses the natural order for examining actions. [23] That is why that method should be only a limited exception to the general rule that examination of the admissibility of an action precedes examination of the substance.

47. However, such an exception should be interpreted only strictly. For reasons of legal certainty, the sound administration of justice and equality between the parties to the proceedings, I consider that reversing the normal order and, all the more so, omitting to examine an absolute bar to proceedings, may be justified only in strictly circumscribed situations and on the basis of criteria which are as relevant as they are transparent, with a statement of the reasons for using them in each particular case.

48. As we know, two sets of reasons are put forward in the case-law in order to evade examining the admissibility of an action for annulment, one being connected with economy of procedure and the other with the proper administration of justice. [24]

49. Where the admissibility of an action for annulment gives rise to doubt, the economy of procedure, which contributes to the dispatch of proceedings, does not seem to me to be generally a sufficient reason to justify omitting to examine an absolute bar to proceedings. On the contrary, consideration of the principle of economy of procedure should logically lead to priority being given to an examination of admissibility before a ruling is given on the substance, unless the action is manifestly unfounded.

50. I admit that, when the Court rules on the substance, the judgment may no doubt provide greater legal certainty from the viewpoint of national authorities and the European citizen and prevent future disputes. However, the proper administration of justice cannot be confined to the substance of questions of law, but applies equally, and for the same reasons, to questions of a procedural nature and, in particular, questions of admissibility.

51. In fact, a cogent argument justifying the examination of admissibility is precisely connected with the principles of the sound administration of justice and economy of procedure. To ensure compliance with those principles, the parties must be told as soon as possible whether or not they have capacity to take part in the proceedings. That argument seems to me even more relevant in relation to a specific category of applicants, namely non-member States which have concluded agreements with the European Union and may frequently have an interest in challenging decisions of the European Union institutions. [25]

23 — This approach is also used where it is necessary to rule on whether there is an absolute bar to proceedings, such as *locus standi*, the period for bringing proceedings, or establishing what are challengeable measures. See, to that effect, *Council* v *Boehringer*, paragraphs 50 to 52; *Poland* v *Council*, paragraphs 27 to 33, and *France* v *Commission*, paragraph 26. Like the Court of Justice, the General Court and the Civil Service Tribunal do not hesitate to give a decision directly on the merits without spending time on a ruling on the admissibility of the action if it can easily be dismissed as unfounded. See inter alia Case T-216/05 *Mebrom* v *Commission* [2007] ECR II-1507, paragraph 60. For the Civil Service Tribunal, see, for example, Case F-32/08 *Klein* v *Commission* [2009] ECR-SC I-A-1-5 and II-A-1-13, paragraphs 20 and 21 and the case-law cited.

24 — Regarding the criterion connected with the proper administration of justice, see in particular *Council* v *Boehringer*, paragraph 52. See also Case C-6/06 P *Cofradía de Pescadores 'San Pedro' de Bermeo* v *Council* [2007] ECR I-164, paragraphs 20 to 22. For the circumstances in which the non-examination of a plea of inadmissibility was justified by the requirements relating to economy of procedure, see the judgment of 10 September 2010 in Case T-284/06 *Gualtieri* v *Commission*, paragraphs 22 and 45. The Civil Service Tribunal was able to combine both those grounds in Case F-134/06 *Bordini* v *Commission* [2008] ECR-SC I-A-1-87 and II-A-1-435, paragraphs 56 and 57.

25 — Regarding the right of non-member States to submit observations, it should be added that, in accordance with the fourth paragraph of Article 23 of the Statute of the Court of Justice of the European Union, non-Member States may, in the context of agreements concluded by the Council and one or more non-member States, submit statements of case or written observations where a question falling within the scope of the agreement is referred to the Court for a preliminary ruling.

52. In my opinion, the procedural rules, interpreted in that way by taking an approach aiming to guarantee effective judicial protection, have an essential place in the proper organisation and conduct of an action. Compliance with them ensures equal treatment of the parties and the impartiality of the procedure.[26] In any case, the conditions of admissibility which are a matter of public policy must be applied transparently so as to avoid any impression that *locus standi* is a condition of admissibility which is not required systematically in relation to every individual.

53. I consider that the mere finding by the General Court that 'given the circumstances of the present case, it is not necessary to rule on the admissibility of the present action' does not fulfil the requirements of transparency and a statement of reasons.[27] That is all the more so in view of the order in *Switzerland* v *Commission* transferring the case to the General Court, in which the Court of Justice expressly raises the question.

54. Given the silence of the General Court on the subject, the doubts expressed concerning the Swiss Confederation's *locus standi* and the fact that the question which arises for the Swiss Confederation today is a question which is bound to arise for other non-member States which have concluded agreements with the European Union, I consider that the Swiss Confederation's *locus standi* should be examined in the present case.[28]

3. The conditions of admissibility applicable to the Swiss Confederation in the present case

a) Treatment of the Swiss Confederation as a Member State for the purpose of the fourth paragraph of Article 230 EC

55. Switzerland submits, principally, that it has *locus standi* as a signatory of the Air Transport Agreement. It considers that that is a logical consequence of Article 20 of the Agreement, which provides that the Court has exclusive jurisdiction for questions concerning the validity of decisions of the Community institutions taken on the basis of their competences under the Agreement. Those decisions include decisions taken in the framework of the Air Transport Agreement, which are thereby binding on Switzerland.

56. However, I do not share that view. In order to reach that conclusion, it is necessary to take into account, first, the Court's case-law on the subject and, secondly, the particular context of the Air Transport Agreement.

57. It is common ground that the Member States have, by virtue of the second paragraph of Article 230 EC, a privileged position as they have no need to demonstrate their *locus standi* or their interest in bringing proceedings in relation to any measure against which an action may be brought. That privilege has always been interpreted restrictively.

26 — Opinion of Advocate General Poiares Maduro in *Poland* v *Council*, point 27 et seq.

27 — Even though the General Court did not give a ruling on the admissibility of the Swiss Confederation's action, it found, in paragraph 21 of the order in *Switzerland* v *Commission* granting Landkreis Waldshut leave to intervene on the basis of the second paragraph of Article 40 of the Statute of the Court of Justice, that the Swiss Confederation was not a Member State. I infer from that that it implicitly considered that the Swiss Confederation must be treated as a legal person for the purpose of the fourth paragraph of Article 230 EC.

28 — I would add that, if the reply to the question is in the negative, Switzerland will not be deprived of means of protecting its interests because it can use the diplomatic procedure of the Joint Committee provided for in Article 21 of the Agreement.

58. As the Court has held, if the contrary were true, it would undermine the institutional balance provided for by the Treaties, which determine the conditions under which the Member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Union institutions. It is not possible for the European Union to comprise a greater number of Member States than the number of States between which it was established. [29]

59. I conclude from this that the bilateral form of cooperation chosen by the Swiss Confederation cannot put it on an equal footing with the Member States in relation to their procedural status and, as appears from the case-law relating to the abovementioned Agreement on the free movement of persons, cannot lead to a situation where the 'à la carte' principle would be equivalent to the advantages procured by accession to the European Union.

60. Furthermore, the wording of the Air Transport Agreement does not uphold the interpretation to the effect that the principle of equal treatment extends to the procedural privileges of the Member States laid down by the Treaties. The Agreement contains no provision for treating the Swiss Confederation as a Member State for the purposes of European Union law generally. On the contrary, as shown by the annex to the Agreement, such treatment applies only for the purposes of the Agreement and for the application of the regulations and directives listed in the annex, and not for the general application of primary European Union law.

61. On that point, in the words of the annex, wherever acts specified in the annex contain references to Member States, or a requirement for a link with the latter, the references apply equally to the Swiss Confederation. It must be stressed that such treatment cannot extend to the application of a privileged procedural status comparable to that of the Member States under the second paragraph of Article 230 EC. [30]

62. That interpretation is confirmed not only by the fact that the Agreement contains no express provision to that effect, but also by the objective of the Agreement laid down in Article 1. In accordance with that article, the Agreement sets out rules for the Contracting Parties in the field of civil aviation. That article states that the provisions of the Agreement are without prejudice to those of the EC Treaty. Those provisions relate, inter alia, to the conditions for admissibility of actions for annulment, which include the privileged conditions applying to the Member States by virtue of the second paragraph of Article 230 EC.

63. A contrary interpretation, which would go beyond the wording of the Agreement in a way which is expressly prohibited by the Court's case-law, would have the consequence of granting the Swiss Confederation *locus standi* to challenge any decision of the European Union institutions falling within the material scope of the Air Transport Agreement. In addition, that outcome would be contrary to the actual wording of the Air Transport Agreement, in particular Article 1(1), which aims to secure the independence of the European Union in taking decisions. This applies also to Article 1(2), which enables the contracting parties to refer issues to the Joint Committee, and to Article 19(2), which requires the Swiss Confederation to be fully informed of acts of the Community institutions which are of interest to it.

64. Therefore the fact that the Swiss Confederation is a contracting party to the Air Transport Agreement is not sufficient for it to be given *locus standi* and be treated as a Member State for the purpose of the second paragraph of Article 230 EC.

29 — Orders in Case C-95/97 *Région Wallonne* v *Commission* [1997] ECR I-1787, paragraph 6, and Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 6. See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-417/04 P *Regione Siciliana* [2006] ECR I-3881, points 44 to 54, and the judgment in that case, paragraph 21.

30 — See, by analogy, Case C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 50, and the Opinion of Advocate General Léger in that case, point 66.

b) *Locus standi* of the Swiss Confederation the basis of the fourth paragraph of Article 230 EC

i) The status of contracting party as justification for *locus standi*

65. In order to justify its *locus standi* on the basis of the fourth paragraph of Article 230 EC, the Swiss Confederation would have to be directly [31] and individually [32] concerned by the contested decision addressed by the Commission to the Federal Republic of Germany.

66. Article 20 of the Air Transport Agreement confers on the Court exclusive jurisdiction to rule on the validity of decisions of the institutions of the Community taken on the basis of their competences under the Agreement.

67. In the present case, the Swiss Confederation has brought an action for the annulment of a decision taken by the Commission on the basis of Articles 15 and 18(2) of the Air Transport Agreement and Article 8(3) of the Access Regulation. That is therefore a decision within the meaning of Article 20 of the Air Transport Agreement.

68. The role of the Swiss Confederation in the administrative procedure before the Commission is determined by Article 19(2) of the Air Transport Agreement, which states that, when decisions which are of interest to the Swiss Confederation and concern the Swiss authorities or Swiss undertakings are taken by the Community institutions, the Swiss authorities are to be fully informed and given the opportunity to comment before a final decision is taken. Article 20, which confers jurisdiction on the Court to examine the validity of the Commission's decision, becomes applicable only when the decision has been taken.

69. That is precisely the case with regard to the decision contested by the Swiss Confederation. The contested decision affects the Swiss Confederation itself, in view of the object of Articles 8 and 9 of the Access Regulation, for the application of which the Swiss Confederation is treated as a Member State in accordance with the annex to the Air Transport Agreement.

70. However, Article 20 of the Air Transport Agreement does not govern the conditions for the admissibility of actions for annulment brought before the Court. As there is no express provision to that effect, those conditions are determined under the relevant provisions of the EC Treaty, in accordance with Article 1(1) of the Air Transport Agreement.

71. Consequently, it is not sufficient for the Swiss Confederation to complain of infringement of Chapters 2 and 3 of the Agreement in order to gain access to the floor of the Court. The possible *locus standi* of the Swiss Confederation for the purpose of bringing the present action before the General Court for the annulment of the contested decision of the Commission, which is not addressed to it, must therefore be examined by reference to the fourth paragraph of Article 230 EC.

31 — Joined Cases C-445/07 P and C-455/07 P *Commission* v *Ente per le Ville vesuviane* [2009] ECR I-7993, paragraph 45 and the case-law cited. For an individual to be directly affected, the Community measure challenged must directly affect his legal position and leave no discretion to the addressees of that measure who are entrusted with its implementation, that being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules.

32 — 'Individual concern' was defined by the Court in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, from which it is apparent that a natural or legal person person other than that to whom a decision is addressed may only claim to be individually concerned if that decision affects him by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is differentiated from all other persons: see inter alia Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraph 52.

ii) Direct and individual concern to the Swiss Confederation

72. The fourth paragraph of Article 230 EC is of particular importance for ensuring adequate judicial protection for all persons, whether natural or legal, who are directly and individually concerned by the acts of Community institutions which are not addressed to them.

73. It has consistently been held that standing to bring an action must be recognised in the light of that purpose alone and the action for annulment must therefore be available to all those who fulfil the objective conditions prescribed, that is to say, those who possess the requisite legal capacity and are directly and individually concerned by the contested decision. [33]

74. With regard to the first condition, namely direct concern, I observe it that involves a twofold requirement, namely a requirement that the contested decision directly affects the applicant's legal situation and a requirement that the decision leaves no discretion to its addressee. [34]

75. With regard to the first criterion for a direct connection arising from the change in the applicant's legal situation, it follows from the contested decision that, under Article 8(2) of the Access Regulation, the Federal Republic of Germany may continue to apply the measures in question. The Commission's contested decision, which is binding on the other Member States as well as the Swiss Confederation, therefore confirms the admissibility of those measures and consequently directly affects the legal position of those States. With regard to the second requirement for a direct connection relating to the lack of discretion, I find that it is difficult to apply this to the case covered by Article 8(3) of the Regulation. Having said that, from the viewpoint of applying the Regulation, the Commission's position is final. That position confirms a situation which directly affects the Swiss Confederation. [35] The two requirements for direct concern are therefore satisfied.

76. Next, with regard to individual concern, the Swiss Confederation, as a State which is a party to the Agreement, could see its legal situation changed by any breach of the Agreement. [36] However, as I have previously said, the alleged breach of the agreement is not sufficient for the purpose of bringing an action before the Court on the basis of Article 20 of the Agreement. Nevertheless, I consider that the Swiss Confederation is individually concerned by the contested decision of the Commission.

77. First, the participation in the decision-making procedure of an applicant to whom the contested decision is not addressed is an important element in examining possible individual concern. [37] The Swiss Confederation not only originated the complaint that led to the opening of the examination procedure within the meaning of Article 8(3) of the Access Regulation, it also presented its observations during the procedure in accordance with Article 19(2) of the Air Transport Agreement.

33 — See point 41 of the Opinion of Advocate General Poiares Maduro in *Poland* v *Council*. A public entity may also bring such an action, but it must comply with the conditions for admissibility. For the case-law concerning overseas countries and territories, regions and autonomous communities, see, for example, Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, paragraph 14 et seq.; *Nederlandse Antillen* v *Council*, paragraph 51; and *Regione Siciliana* v *Commission*, paragraphs 21 and 24. See also the order in Case T-37/04 P *Região autónoma dos Açores* v *Council* [2004] ECR II-2153, paragraph 112.

34 — See inter alia Case C-15/06 P *Regione Siciliana* v *Commission* [2007] ECR I-2591, paragraph 31 and the case-law cited.

35 — I would add that the requirement of lack of discretion is difficult to apply to a situation in which, by virtue of a Commission decision, a Member State may continue to apply measures such as those at issue in the present case without being obliged to do so. Such authorisation may nevertheless affect the legal situation of a third party in whose interest it would be if the measures in question were not permissible.

36 — It is not disputed that that the general interest of a region cannot, on its own, be sufficient for it to be considered as being individually concerned: see the order in Case T-417/04 *Regione Friuli-Venezia* v *Commission* [2007] ECR II-641, paragraph 61 and the case-law cited, and the order in Case T-609/97 *Regione Puglia* v *Commission and Spain* [1998] ECR II-4051, paragraph 21 and the case-law cited.

37 — See by analogy, in the context of State aid, Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 56 and the case-law cited.

78. Secondly, decisions taken under Articles 8 and 9 of the Access Regulation can only be addressed to a Member State.[38] Under Article 8(3) of the Access Regulation, any Member State may refer a matter to the Commission, which communicates its decision to all the other Member States. In the context of the procedure laid down by Article 9(3) of the Regulation, the involvement of all the other Member State is even more apparent because the Member State which proposes to take the measures must inform not only the Commission, but also the other Member States. I point out that, in view of the wording of the annex to the Agreement, which provides for the Swiss Confederation to be treated as a Member State wherever the Access Regulation refers to the Member States, the Swiss Confederation is to be treated as a Member State for the purpose of applying Articles 8 and 9 of the Regulation.

79. I would add that it is clear from Articles 8 and 9 that the management of the exercise of traffic rights is of interest not only to the State which took the measure and the States concerned by the operation of an air service[39] within the meaning of the Access Regulation, but to all Member States. The regulation lays down access to air transport services, which is the reason why any Member State – including, as a result of the Air Transport Agreement, the Swiss Confederation – has an interest in the application of rules which may restrict the exercise of traffic rights within the meaning of the regulation.

80. Consequently, in the procedures referred to in Articles 8 and 9 of the Regulation, the succeeding stages concern any Member State, the status which the Swiss Confederation is treated as having. This applies particularly to the right to refer a matter to the Commission and the receipt of notification of its decision. Articles 8 and 9 give the Commission power to take decisions which are binding on all the Member States and, by extension, the Swiss Confederation.

81. In the present case, the contested decision thus affects the legal position of the Swiss Confederation by virtue of its capacity of a contracting party to the Air Transport Agreement and thereby, in conjunction with the material subject-matter of the contested decision, differentiates it from all other persons.

82. I conclude that, in the particular circumstances of the present case, taking account of the specific context of the Air Transport Agreement and Articles 8 and 9 of the Access Regulation, the Swiss Confederation is directly and individually concerned by the contested decision of the Commission within the meaning of the fourth paragraph of Article 230 EC.

83. The Swiss Confederation is therefore entitled to seek the annulment of the contested decision.

C – *The grounds of appeal put forward by the Swiss Confederation*

1. Preliminary observations

84. In support of its appeal, the Swiss Confederation relies on six grounds alleging breach of procedural as well as substantive provisions. To be precise, the grounds allege erroneous interpretation of Article 9(1) of the Access Regulation, of the Commission's obligation to state reasons and of Article 8(3) of the Access Regulation, and breach of the principle of the freedom to provide services, the principles of proportionality and non-discrimination, and the rules relating to the burden of proof.

38 — See, *a contrario*, the order in *Regione Puglia* v *Commission and Spain*, paragraphs 19 to 21.

39 — According to Article 2(h) of the Access Regulation, the Member States concerned are those between or within which an air service is operated.

85. Given that the grounds of appeal overlap, I shall deal with them, after a few preliminary remarks, by discussing, first, the scope of Articles 8 and 9 of the Access Regulation and, next, the Commission's powers of review deriving from Article 8 of the Regulation. Finally, I shall consider the Swiss Confederation's claims of disregard by the General Court of the rules of the burden of proof.

86. The Air Transport Agreement forms the particular context of the present case. Although, in the air sector, the integration of the Swiss Confederation into the internal market of the European Union is greater than in the sectors covered by the six other acts of the package of agreements concluded with the Swiss Confederation,[40] the fact remains that, with no express provision to that effect in the agreement in question, the objective of guaranteeing the freedom to provide services is absent and the objective is limited to laying down the rules applying to civil aviation, in particular, so far as the present case is concerned, an exchange of traffic rights on the conditions laid down in the Air Transport Agreement.[41]

87. However, regarding the interpretation of secondary law in the context of the Agreement, I do not think that the provisions of secondary law mentioned in the annex to the Agreement should be interpreted in a way different from that used in situations purely internal to the European Union. Nevertheless, such an approach applied to the interpretation of substantive provisions of secondary law cannot be accepted where the interpretation of those provisions derives from case-law which was developed after the signature of the Air Transport Agreement and relates to general principles of European Union law, or even to provisions of primary law.

2. The scope of Articles 8 and 9 of the Access Regulation

88. The first and second grounds of appeal relate to the interpretation of Article 9 of the Access Regulation. In essence, the Swiss Confederation claims that the General Court interpreted and applied Article 9 wrongly and that, by doing so, it also interpreted and applied wrongly the Commission's obligation to state reasons.

89. I do not share that view, taking into account the scope of Articles 8 and 9 respectively.

90. With regard to the first ground of appeal, which alleges erroneous application of Article 9(1) of the Access Regulation, it must be observed, as the General Court did, that, under Article 8(2) of the regulation, the exercise of traffic rights, within the meaning of Article 2(f) of the regulation, is subject to national operational rules relating to safety, the protection of the environment and the allocation of slots.

91. So far as the scope of Article 9 is concerned, it relates, as the General Court rightly points out, to a more particular category of operational rules applicable to the exercise of traffic rights, namely operational rules which impose conditions on, limit or refuse the exercise of traffic rights. The measures referred to by Article 9 therefore include only those which entail a *prohibition*, at least conditional or partial, of the exercise of traffic rights.

92. The Swiss Confederation's arguments concerning the classification of the German measures in question as restrictions referred to by Article 9 of the Access Regulation is not persuasive.

40 — For the classification of the Air Transport Agreement as an integration agreement, see Haldimann, U., 'Grundzüge des Abkommens über den Luftverkehr', in Felder, D., and Kaddous, C. (ed.), *Accords bilatéraux Suisse-UE*, *Bilaterale Abkommen Schweiz-EU*, Bruylant, Brussels 2001, pp. 443 to 461.

41 — However, according to Article 15(2) of the Agreement, traffic rights are granted to Swiss air carriers gradually. The Agreement also guarantees the freedom of establishment for Community and Swiss carriers in that particular field by virtue of Article 4. For further details, see Kaddous, C., 'Les accords sectoriels dans le système des relations extérieures de l'Union européenne', op.cit., pp. 81 to 82.

93. In the present case the General Court has clearly set out the reasons why the German measures do not involve any prohibition whatever on the crossing of German air space by flights leaving or arriving at Zurich Airport during the period while the measures apply.

94. The General Court observes on that point that the measures are, in essence, confined to preventing for specified periods overflights at low altitude over the part of German territory close to the Swiss border, while permitting overflights over the same territory at a higher altitude. In essence, therefore, the measures entail a mere change in the flight path of the flights concerned, without limiting the exercise of traffic rights within the meaning of Article 9 of the Access Regulation.

95. Furthermore, the General Court clearly found that the existence of operational rules, in particular those relating to protection of the environment, which must be complied with for the purpose of the authorisation of the exercise of traffic rights within the meaning of the Access Regulation, is not equivalent to the imposition of a condition or limitation, within the meaning of Article 9(1) of the regulation, on exercising those rights. If that were the case, Article 8(2) of the regulation would be rendered completely meaningless because any operational rule would then fall within the scope of Article 9.

96. Having regard to those considerations, the first ground of appeal must be rejected.

97. The second ground of appeal, alleging erroneous interpretation of the Commission's obligation under Article 253 EC to state reasons, should likewise be rejected. On that point, it is sufficient to observe that it has consistently been held that the statement of reasons must be appropriate to the measure at issue and that a decision of the Commission must disclose in clear and unequivocal fashion the reasoning followed by the Commission, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. To fulfil that obligation, it is not necessary to set out all the conceivable reasons or to go into all the facts and assess them in detail.[42]

98. It is clear from the judgment under appeal that the General Court was able to exercise its power of review on the basis of the reasons put forward in the contested decision. Indeed, as the Court observed, the decision clearly shows the reasons, both substantive and procedural, why the Commission considers that the German measures at issue must be examined from the viewpoint of Article 8, and not Article 9, of the Access Regulation.[43]

99. Nor can the Swiss Confederation succeed with its argument alleging, first, substitution of grounds by the Commission in the course of the proceedings and, secondly, an error of law on the part of the General Court in so far as it did not accept the Swiss Confederation's argument concerning the substitution of grounds by the Commission. The concept of substitution of grounds cannot be understood as including any reaction by the Commission to the other party's arguments before the Court, given that, as the Court correctly observes, the contested decision already clearly shows the reasons why the Commission considers that the German measures at issue do not fall within the scope of Article 9(1) of the Access Regulation.

42 — See inter alia Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 50 and the case-law cited.

43 — I would add that that is particularly so in the present case, given that it has consistently been held that the obligation to state reasons is reduced where the person concerned has been able to participate in the administrative procedure preceding the adoption of the contested decision and has had an opportunity to put his case: see, to that effect, inter alia Case C-445/00 *Austria* v *Council* [2003] ECR I-8549, paragraphs 49 and 50.

3. The Commission's powers of review under the Access Regulation

100. The third, fourth and sixth grounds of appeal concern, in essence, the interpretation and application of Article 8(3) of the Access Regulation in the context of the Air Transport Agreement. The sixth ground, which relates to a particular aspect of the examination of the proportionality of the German measures in question, depends on the success or otherwise of the fourth ground, to which it mainly refers. Consequently, if the fourth ground is dismissed, as I propose, the sixth must also be dismissed.

101. The Swiss Confederation cannot succeed with its argument that the General Court erred in law in interpreting and applying Article 8 of the Access Regulation. On the contrary, those three grounds of appeal are based on an erroneous premiss concerning the Commission's powers under the Access Regulation in the context of the Air Transport Agreement.

a) The connection between the Air Transport Agreement and the Access Regulation

102. First of all, the Commission's powers under Article 8(3) of the Access Regulation in relation to its examination of the German measures in the context of the Air Transport Agreement must be interpreted while remaining faithful to the wording and the objectives of the instruments in question.

103. The Air Transport Agreement aims to secure the exchange of traffic rights between Community and Swiss air carriers under the conditions laid down by the Agreement. In particular, it is clear from Article 15(1) of the Agreement that the Agreement aims to grant traffic rights that are not absolute but subject to the Access Regulation. The Access Regulation for its part aims to permit access for air carriers to scheduled intra-Community air service routes. In other words, it governs the grant of traffic rights to air undertakings.

104. However, the grant of traffic rights within the meaning of that regulation is subject to conditions, in particular those laid down by Article 8(2) of the regulation. Accordingly, the exercise of traffic rights granted under the regulation depends on national operational rules relating to safety, the protection of the environment and the allocation of slots.

105. The provisions of the Air Transport Agreement cannot enlarge the scope of the Access Regulation when it is applied to the relations between the parties to the Agreement, as the General Court rightly found. In other words, the regulation is not intended to apply to situations governed by the Agreement which do not fall within the scope of the regulation in a purely Community context.[44]

106. In that connection, nothing is changed by the wording of Article 2 of the Air Transport Agreement. It is true that Article 2 states that the provisions of the annex to the Agreement apply to the extent that they concern air transport or matters directly related to air transport. However, as the General Court observed in the judgment under appeal, Article 2 determines and delimits only the scope of the provisions listed in the annex to the Agreement by excluding the application of those provisions in the context of the Agreement to cases which do not concern air transport or matters directly related to air transport. Contrary to the claims of the Swiss Confederation, that limitation in no way affects the material scope of the Access Regulation, which governs only the grant of traffic rights to air carriers.[45]

44 — In addition, I note that the particular problem of noise is governed by Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports (OJ 2002 L 85, p. 40) and Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (OJ 2002 L 189, p. 12).

45 — The only enlargement of the scope of the Access Regulation in the context of the Air Transport Agreement is that resulting from the treatment of the Swiss Confederation as a Member State and the treatment of air carriers having their registered office there as Community carriers.

107. That is why the Commission's powers of review which flow from the regulation are limited, in the context of the examination under Article 18(2) of the Air Transport Agreement – which incidentally restricts the Commission's powers in the context of the Agreement to cases which may concern air services – and Article 8(3) of the Access Regulation to an examination of the implications of the measures for the exercise of traffic rights.

108. The Commission is required, more exactly, to verify that the measures were taken for reasons relating to safety, the protection of the environment or the allocation of slots and that they apply, so far as the exercise of traffic rights is concerned, to air carriers in a non-discriminatory way. The interests of the airport operator and of persons living near the airport are not therefore taken into account in the examination of the German measures under Article 18(2) of the Air Transport Agreement and Article 8(3) of the Access Regulation.

b) The principles inherent in the freedom to provide services

109. By the third ground of appeal, the Swiss Confederation complains that the General Court erroneously interpreted Article 8(3) of the Access Regulation by omitting to ascertain whether the contested decision conforms with the principle of the freedom to provide services and the principle of proportionality.

110. The factors to which the Swiss Confederation refers in this ground of appeal, particularly those based on the general principles of the freedom to provide services and of proportionality, were established in a Community context.[46] As the Air Transport Agreement does not expressly refer to those principles, the Commission did not have to take them into account when examining the measures at issue in the present context, there being no basis for doing so in the Air Transport Agreement.

111. As I have already said, the conclusion of the Air Transport Agreement does not lead to the automatic application of Community law in its entirety in relation to the Swiss Confederation. On the contrary, by opting for the path of bilateral agreements, the Swiss Confederation has knowingly chosen a route that does not permit participation in the internal market as extensive as that which would be based on accession to the European Union or the European Economic Area. The wording of the Agreement, particularly that of Articles 1 and 3, shows clearly that its objective was not to apply in that field either the freedom to provide services, as laid down by Articles 49 EC and 51 EC, in relation to the Swiss Confederation, or the principle of proportionality. It follows that the Commission is in no way obliged to ascertain whether the German measures in question conform to the general principle of the freedom to provide services and, in particular, the principle of proportionality.

112. In the present case, the General Court did not expressly state a view on the question whether those principles apply in the context of the present case or not. However, the Court carried out a supplementary examination of the contested decision from that viewpoint and found that the measures in question were in no way inconsistent with those principles.

46 — The Commission decisions to which Switzerland refers are Decision 98/523/EC of 22 July 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (OJ 1998 L 233, p. 28) and Decision 94/290/EC 27 April 1994 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (OJ 1994 L 127, p. 22). See also Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, concerning the second decision. Given the purely Community context of those decisions, the Commission had to take into account primary Community law and the general principles of Community law in examining the measures in question. With regard to the Court's case-law, in particular Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, it should be observed that that judgment was given *after* the Agreement was signed. It follows that the judgment can give no guidance for interpreting the Agreement unless it has been notified to and examined by the Joint Committee provided for in Article 21(1) of the Air Transport Agreement.

113. However, as those principles are not applicable in relation to an examination of the German measures in question, the ground of appeal directed against the grounds of the judgment under appeal concerning the alleged infringement of the freedom to provide services cannot lead to the annulment of the judgment.[47]

114. Consequently, the third ground of appeal must be rejected as ineffective.

c) The principle of non-discrimination

115. With regard to the fourth ground of appeal, in which the Swiss Confederation complains that the General Court breached the principle of non-discrimination, it must be stated that the limitation of the powers of review does not affect the examination of the German measures from the viewpoint of the principle of non-discrimination That follows from Articles 1(2) and 3 of the Air Transport Agreement, which expressly prohibit any discrimination on the ground of nationality. However, as I have already explained, the Commission's powers of review do not extend to taking account of the interests of Swiss persons living near Zurich Airport and the operator of the airport.

116. As regards the application of the principle of non-discrimination to air carriers, in particular Swiss, the company that uses Zurich Airport as a hub,[48] I consider that there was no error of law on the part of the General Court in that connection.

117. The General Court began by observing that, according to settled case-law, the principle of non-discrimination forbids not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[49]

118. On the basis of the abovementioned case-law, the General Court went on to observe that, even though the German measures would have the same result as discrimination on the ground of nationality in relation to Swiss air carriers, in particular the airline Swiss, because that airline uses Zurich Airport as a turntable, it would also be necessary for the measures not to be justified by objective circumstances and not to be proportionate to the objective pursued.

119. The General Court then considered the facts and found, in relation to the first requirement that the contested measures should have a legitimate objective, that in the present case there were objective circumstances justifying the adoption of the Implementing Regulation, in particular those relating to the reduction of noise pollution in a tourist region of Germany, within the meaning of the abovementioned case-law.

120. As regards the second requirement of proportionality of the measures concerned, the General Court first examined in detail the evidence before it. It observed that the Member States were entitled to adopt measures aiming to reduce noise pollution below the prescribed limits and that, as the Federal Republic of Germany had no authority over the use of Zurich Airport, it had no other means of attaining the objective pursued. This led the Court to conclude that, as there was no evidence of the

47 — See inter alia Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 148 and the case-law cited, and Case C-504/09 P *Commission* v *Poland* [2012] ECR, paragraph 90 and the case-law cited.

48 — The operation of hub-and-spoke networks means that air carriers use one airport as an interchange platform. This has become a common operational model among air carriers.

49 — In the judgment under appeal the General Court mentioned Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 14; Case C-224/00 *Commission* v *Italy* [2002] ECR I-2965, paragraph 15; and Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 92.

existence or even the possibility of major drawbacks for Zurich Airport or of less onerous measures which would enable the objective, referred to by the Implementing Regulation, of reducing noise pollution to be attained, the German measures had to be considered to be proportionate to the objective pursued.

121. I would observe that such an appraisal does not, save where the evidence adduced before the General Court has been distorted, constitute a point of law which, as such, is subject to review by the Court of Justice.[50] Furthermore, such distortion must be obvious from the documents in the case without it being necessary to undertake a fresh assessment of the facts and evidence.[51]

122. In the present case, as the Swiss Confederation's arguments, in essence, merely dispute the General Court's assessment of the facts, it is not obvious that the Court's findings contain inaccuracies capable of being subject to review by the Court of Justice.

123. In addition, I consider that a contrary conclusion would mean that any operational rule with the aim of ensuring the safety, protection of the environment or the allocation of slots would automatically be discriminatory in so far as such measures affect more often air carriers who use the airport concerned as a hub. Such an interpretation of the principle of non-discrimination would deprive Article 8(2) of the Access Regulation of its practical effect.

124. In the light of those considerations, the fourth ground of appeal must be rejected.

125. Finally, the sixth ground of appeal relates to a specific aspect of the General Court's examination of the proportionality of the German measures. By the sixth ground, the Swiss Confederation complains that the General Court erred in law by ruling out the possible existence of less onerous measures. Taking into account my assessment of the fourth ground of appeal and my proposal to reject it, I consider that the sixth ground is also incapable of leading to the annulment of the judgment under appeal, and consequently it should be rejected as ineffective.

4. The rules concerning the burden of proof

126. By its fifth ground of appeal, which alleges arbitrary interpretation of the rules concerning the burden of proof, the Swiss Confederation merely repeats once more its arguments concerning the alleged error in law on the part of the General Court in examining the proportionality of the German measures, having regard to the principle of non-discrimination. Therefore, in view of the reply to the fourth ground of appeal, I consider that the Swiss Confederation's argument may be dismissed immediately.

127. In any case, it is for the person who wishes to assert a right in court to prove the facts on which he bases his claim. Therefore I think that the General Court correctly applied the rules on the burden of proof in finding that it was for the Swiss Confederation to prove that the Implementing Regulation was not a measure which was necessary and proportionate to the objectives pursued. In default of such proof, the General Court carried out an assessment of the facts which led it to find that the existence of less onerous measures had not been proved.

128. As Switzerland has not shown that there was any distortion capable of being subject to review by the Court, the fifth ground of appeal must be rejected.

50 — See inter alia Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51; see also Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 72 and the case-law cited.

51 — See inter alia Case C-264/11 P *Kaimer and Others* v *Commission* [2012] ECR, paragraph 24 and the case-law cited.

VI – Conclusion

129. In the light of all the foregoing considerations, I propose that the Court should:

— dismiss the appeal by the Swiss Confederation;

— order the Swiss Confederation to bear its own costs and to pay those incurred by the Commission; and

— order the Federal Republic of Germany and Landkreis Waldshut to bear their own costs.